87-819

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987.

KEELY SMITH,

Petitioner

v.

INTERNATIONAL FUNDING CORPORATION, A California corporation, MAX D. MARTIN, an individual, CHARLES E. ELERDING, JR., an individual, JANET R. ELERDING, an individual, T.D. SERVICE COMPANY, a California corporation,

Respondents.

On Appeal from the Ninth Circuit Court of Appeals

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Judgment entered October 7th, 1983, resolved all the issues relating to the usurious transaction before the Court, or whether said Judgment left important issues unresolved, and thus was not a final judgment.

2. Whether Petitioner's Motion to Alter or Amend the Judgment Pursuant to FRCP 59(e) filed October 20th, 1983, is to be treated as a nullity, and that if the Court was correct in determining that the Judgment entered October 7th, 1983, was a final one, there is no way Petitioner can obtain relief from said Judgment when said Judgment was clearly erroneous as a matter of law in that the usurious rate of interest was reduced by the Court to a non-usurious rate, rather than following the established law that all interest is forfeited on usurious obligations and all payments made on interest are applied to principal.

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INTERNATIONAL FUNDING CORPORATION, A California corporation, MAX D. MARTIN, an individual, CHARLES E. ELERDING, JR., an individual, JANET R. ELERDING, an individual, T.D. SERVICE COMPANY, a California corporation,

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PETITION FOR CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this matter on July 16th, 1986, holding that the Judgment entered October 7th, 1983, was a final judgment, and the Memorandum Opinion

filed June 9th, 1987, wherein the Court of Appeals affirmed the Trial Court's denial of Petitioner's Motion to Treat an Untimely Motion Filed Pursuant to FRCP 59(e) as a Motion for Relief from Judgment under Rule 60(a) 60(b) or Alternatively to Extend the Time for Filing a Notice of Appeal under Federal Rules of Appellate Procedure 4(a)5, and the Order of the Court of Appeals denying Petitioner's Petition for Rehearing filed on July 30th, 1987.

OPINIONS BELOW

The Opinion of the Court of Appeals that upheld the Judgment of the District Court that the Judgment entered on October 7th, 1983, was a final Judgment is reprinted in the separate Appendix to this Petition, pp.1-3.

The Opinion of the Court of Appeals affirming the District Court's denial of Petitioner's Motion to Treat an Untimely

Motion Filed Pursuant to FRCP 59(e) as a Motion for Relief from Judgment under FRCP 60(a) and 60(b), or alternatively to extend the time for filing a Notice of Appeal under FRAP 4(a)5 is reprinted in the separate Appendix to this Petition, pp.4-9.

The Order of the Court of Appeals denying Petitioner's Petition for Rehearing filed on July 30th, 1987, is reprinted in a separate Appendix to this Petition, p. 10.

The Judgment of the United District Court for the District of Nevada, entered October 7th, 1983, is reprinted in the Appendix to this Petition, pp.11-14.

The prior Order of the United States District Court denying Motions entered December 28th, 1984, is reprinted in the Appendix to this Petition, pp.15-18.

A prior Opinion of the United States District Court, District of Nevada entered

November 1st, 1985, determining that the Judgment entered October 7th, 1983 was a final Judgment is reprinted in the Appendix to this Petition, pp. 19-29.

The Findings of Fact and Conclusions of Law filed by then U.S. District Judge Harry E. Claiborne on October 6th, 1983, is reprinted in the Appendix to this Petition, pp. 30-60.

The Motion of October 20th, 1983 Under F.R.C..P. Rule 59 to Alter or Amend Judgment filed in District Court, is reprinted in the Appendix to this Petition, pp.61-65.

JURISDICTION

The Judgment of the Court of Appeals was entered on June 16th, 1986, with respect to the finality of the Judgment entered October 7th, 1983 in the District Court. The Judgment of the Court of Appeals with respect to the District Court's denial of Petitioner's

Motion to Treat an Untimely Motion Filed Pursuant to FRCP 59(e) as a Motion for Relief from Judgment under FRCP 60(a) or 60(b), or Alternatively to Extend the Time for Filing Notice of Appeal under FRAP 4(a)5 filed on June 9th, 1987, and the Order Denying Rehearing on said Order of June 9th, 1987, was entered on July 30th, 1987. The Jurisdiction of this Court is invoked pursuant to Title 28 USC § 1154 (1).

QUESTIONS PRESENTED

1. Whether the Judgment entered October 7th, 1983, resolved all the issues relating to the usurious transaction before the Court, or whether said Judgment left important issues unresolved, and thus was not a final judgment.

2. Whether Petitioner's Motion to Alter or Amend the Judgment Pursuant to FRCP 59(e) filed October 20th, 1983, is to be

treated as a nullity, and that if the Court was correct in determining that the Judgment entered October 7th, 1983, was a final one, there is no way Petitioner can obtain relief from said Judgment when said Judgment was clearly erroneous as a matter of law in that the usurious rate of interest was reduced by the Court to a non-usurious rate, rather than following the established law that all interest is forfeited on usurious obligations and all payments made on interest are applied to principal.

STATUTES AND FEDERAL RULES OF CIVIL AND APPELLATE PROCEDURE INVOLVED

On the question of the finality of the Judgment, Title 28 USC 1291, FRCP 54(b), FRCP 58, FRCP 79(a) and FRAP 4.

On the issue of relief from the Judgment if determined to be final, FRCP 59(e), FRCP 60(a), FRCP 60(b), FRCP 6(a) prior

to the 1985 amendment, and FRCP 6(a) following the 1985 amendment, FRCP 6(e).

(STATEMENT OF THE CASE)

The case came on for trial before former U.S. District Judge Harry E. Claiborne for the District of Nevada in May of 1983. Post-trial briefing occurred and further arguments were heard by the Court, and it was submitted for decision in June of 1983.

Judge Claiborne filed his written Decision, Findings of Fact and Conclusions of Law and Judgment, which were entered on October 7th, 1983. Petitioner filed a 59(b) Motion on October 20th, 1983. Said Motion was untimely by three days, as FRCP Rule 6 (a) existed in 1983, but was timely as rule 6 (a) existed in 1985. One of the reasons stated by the rule makers for the amendment of 6(a) was that by reason of holidays and week ends being counted, the ten days could be reduced to five

working days, which was the situation in the case at bar. However, Petitioner at that time mistakenly believed that the additional three days for mailing under Rule 6(e) was applicable, and that the Motion filed on October 20th, was timely.

No action was taken by Judge Claiborne on any Motions following the Judgment as he was in indicted on December 8th, 1983, and took a leave of absence until his impeachment proceedings were concluded in 1986.

A number of visiting judges entered various orders in the District Court. The other resident U.S. District Court Judge was disqualified by reason of his relationship to counsel for Petitioner. It was not until mid 1984 that the Honorable Lloyd George became a U.S. District Judge and then took over the case. Judge George recognized that Judge

Claiborne erred in requiring Petitioner to pay 10% interest on a usurious loan; however, Judge George determined that there was nothing he could do because Petitioner's Rule 59(e) Motion was three days late.

Before a written Decision was filed by Judge George, Petitioner raised in the lower court the question of whether the Judgment of October 7th, 1983, was a final Judgment. It became obvious to all concerned that the amount that Petitioner owed was uncertain and up in the air from a reading of Judge Claiborne's Judgment.

Counsel for Petitioner then moved the District Court for a determination that the Judgment was not final. By the time that Motion came on before Judge George, Petitioner had filed a Notice of Appeal from Judge George's denial of relief for Petitioner based upon the three days, when Judge George

questioned whether he had jurisdiction to proceed on the Motion to determine the finality of the Judgment. Thereupon, Judge George granted Petitioner leave to apply to the Ninth Circuit Court of Appeals for a limited remand so that the District Court could consider the Motion as to finality. Petitioner filed such a Motion with the Ninth Circuit Court of Appeals which was granted, and Judge George considered the motion of finality and ruled that it was a final Judgment. Petitioner then appealed from said ruling of Judge George. The Ninth Circuit Court of Appeals consolidated the appeal based upon the three days and upon the finality, but had the briefing of the question of finality first, and the decision on that issue first, which resulted in the Opinion of the Ninth Circuit of the 16th day of July, 1986, holding that the Judgment of October 7th, 1983 was final. Then further

briefing occurred with respect to the three day issue and the Ninth Circuit Court of Appeals affirmed the trial court's ruling denying relief on the three day issue. Petitioner sought rehearing, which was denied. Thus, the instant Petition for Certiorari to the Supreme Court of the United States.

The action below was commenced in 1979 where at that time Petitioner secured a temporary and then later a preliminary injunction, enjoining the Respondents from foreclosing on Petitioner's home in Las Vegas, Nevada on a Deed of Trust held by Respondents to secure obligations set forth in a certain Promissory Note executed by Petitioner to the Respondent International Funding Corporation. Said Note was in the principal amount of $300,000.00, and contained interest at the rate of 18% per annum. The preliminary injunction remained in effect until the

court's Judgment of October 7th, 1983. The Judgment is a short one, consisting of eight paragraphs over three pages. The case was in a curious posture at the time of foreclosure in that the parties foreclosing on the Deed of Trust were the Elerdings. The Note from Petitioner was to International Funding Corporation for 18% interest. The Deed of Trust secured said Note. International Funding Corporation had executed a Note to Elerding for $300,000.00 with interest at 10%, which was a legal rate. International Funding Corporation assigned its Note and Deed of Trust from Petitioner to Elerdings. Elerdings simply foreclosed on International Funding Corporation note at 18%. Elerdings did not first of all foreclose on its 10% note against International Funding Corporation. Judge Claiborne ruled that Elerding was not a holder in due course.

In the Judgment, Paragraph 1 provided that Plaintiff recover $11,500.20 representing prepayment penalty. Paragraph 1 appears to be a final judgment. Paragraph 2 provides that Plaintiff recover from Martin and International Funding Company $35,000.00 constituting loan fees paid, and paragraph 2 also appears to be a final judgment.

Paragraph 3 reads as follows:

> "That the Plaintiff recover of the Defendants Max D. Martin and International Funding Corporation, a California corporation, the incremental portion of interest above 10 percent paid by the Plaintiff unto the Defendants on loans transacted in 1976 and 1978."

Paragraph 3 is not a final determination for it does not state what interest payments were made, or what the principal sum of said loans are, or should be, or the date from which interest should run.

Paragraph 4 reads as follows:

> "That Plaintiff have judgment against the Defendants Max D. Martin and International Funding Corporation, a California corporation, in that this court adjudges the loan obligations created by the transactions in 1976 and 1978 to be usurious and the Plaintiff is hereby relieved of any obligation to pay any sum of interest thereon exceeding 10 percent per annum."

The portion of Paragraph 4 adjudging the loan obligation to be usurious appears to be a final determination. However, the part relieving Plaintiff from an obligation to pay any sum exceeding 10 percent is not clear and certain, because the amount of interest in excess of 10% is not set forth in the Judgment, nor is the principal amount set forth. If the principal amount is uncertain the interest amount is uncertain.

Paragraphs 5, 6 and 7 are final orders entering judgment of dismissal on certain claims, counterclaims and crossclaims.

Paragraph 8 provides,

> "That the Preliminary Injunction heretofore issued is dissolved."

Thus, the Court dissolved the injunction that prevented foreclosure on the usurious note. The Judgment did not state the amount due that would be foreclosed upon. It certainly cannot be presumed to grant the Elerdings the right to foreclose on the usurious obligation. The judgment of necessity had to include the amount of money that the Elerdings could properly foreclose on, and the Judgment does not do this. On November 2nd, 1983, Elerding has contended the amount due was $297,270.43. Later Elerding contended $567,148.76 was due.

The Judgment does not address the very complex question of pre-judgment interest, and post-judgment interest.

F.R.C.P. 58 states,

> "Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth

and entered as provided in Rule 79 (a)."

Rule 79 (a) provides in part as follows:

"All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief, but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the return showing execution of process."

The District Court's docket entry reads as follows:

"10/6/83 136 FINDINGS OF FACT/CONCLUSIONS OF LAW. Cps dist. cc
137 DECISION: (HEC) See document for spcfcs & Judment (#138)./EOD 10/7/83. Cps dist. cc
138 JUDGMENT: (HEC) ORD P recover of Ds Max D. Martin & Intl Funding Corp sum of $11,520; P recover of Ds Max D. Martin & Intl Funding Corp sum of $35,000; etc; P's actn agnst Ds Charles E. Elerding & Janet R. Elerding & said actn dismd on merits; Cntrclmts Max D. Martin & Intl Funding Corp.'s cntrclm against P dismd on merits; Ds Charles E. Elerding & Janet R. Elerding's x-clm agnst Ds Max D. Martin & Intl Funding Corp dismd on merits; P/I issd dissolved.

EOD 10/7/83. Cps dist. cc (see doc for spcfcs)."

The docket entry refers to paragraphs 1, 2, 5, 6, 7 and 8 of the Judgment. Paragraphs 3 or 4, or the substance thereof is not mentioned in the docket entry. Therefore, it is clear that the substance of the judgment is not set forth in the docket entries. Thus the mandatory requirements of Rule 79(a) have not been met, and it must follow that the mandatory requirement of Rule 58 has not been met.

Compliance with these rules was necessary so that Petitioner would know how much money she owed, so that the persons involved in the foreclosure would know the amount of the debt. This Court can look in vain through all the Orders of the District Court and the Court of Appeals, and cannot find a statement that says Petitioner owes a sum certain.

This Court has on numerous occasions determined whether a judgment is final or not to decide whether or not the case is properly before the Supreme Court. Bruce v. Tobin, 245 US 18 (1917), Catlin v. United States, 324 US 229 (1945), Republic Natural Gas Co. v. State of Oklahoma, 334 US 62 (1948), Cohen v. Beneficial Industrial Loan Corporation, 337 US 541 (1949), United States v. F & M Schaefer Brewing Co., 356 US 227 (1958), United States v. Indrelunas, 411 US 216 (1973), Bankers Trust Company v. Mallis, 435 US 381 (1978). Amoco Oil Co. v. Jim Heiling Oil & Gas Co., Inc. & Harmer Oil, No. 85-2107, 107 S.Ct. 468.

Finality of a judgment for purposes of determining the rights to appellate review in the federal system has been clearly established by the above decisions. The decisions discussed two other important reasons for finality. One being that piecemeal review of

litigation will be avoided. The second being it will be a simple matter to compute the time within which post judgment motions and notices of appeals should be filed.

This Court in Bankers Trust Company case, supra, quoted from Professor Moore in discussing the separate judgment requirement,

> "It must be remembered that the rule is designed to simplify and make certain the matter of appealability. It is not designed as a trap for the inexperienced. The rule should be interpreted to prevent loss of right of appeal not to facilitate loss."

The District Court and the Court of Appeals in this case have interpreted the finality requirement to defeat the right to appeal, rather than to facilitate it.

This case is different from Bankers Trust, supra, and Amoco, supra. Those cases appear to involve complete adjudications without separate documents as judgments. This case involves a separate document - but an

incomplete document. Rule 58 and 79(a) require a complete and separate document.

When Judge Claiborne dissolved the preliminary injunction allowing the foreclosure to go forward, it was absolutely essential that he set forth the amount of money petitioner owed so that she could take steps to pay off the obligation and avoid the foreclosure. Failing to do this, Judge Claiborne did not render a final judgment.

FRCP 54(b) states,

> "In the absence of such determination and direction any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all parties."

The October 7, 1983 Judgment was subject to revision under Rule 54(b). So,

clearly Petitioner's October 20th, 1983 Motion seeking a determination of the amount due called upon the District Court to invoke Rule 54(b), and decide the issue. See pp. (61-65) of Appendix.

THE THREE DAY ISSUE

The District Court and the Court of Appeals have held that no relief is available to the Petitioner because the Motion of October 20th, 1983, should have been filed by October 17th, 1983. Petitioner asserts that said Courts erred in not granting Petitioner relief from the 3 day delay for the following reasons, in addition to the finality question:

(a) October 7th, 1983 was a Friday, the date the Judgment was entered and mailed. Monday, October 10th, 1983 was Columbus Day, a non-judicial day.

Counsel for Petitioner left his home in Las Vegas, Nevada, with his wife and three

youngest children on Friday, October 7th, 1983, to spend the holiday weekend in California. Petitioner's counsel was unaware of the filing of the Decision, Findings and Judgment. Counsel for Petitioner returned to Las Vegas, Nevada, on the evening of Columbus Day, Monday, October 10th, 1983. On October 11th, 1983, in the early morning Petitioner's counsel accompanied his wife Phyllis to the hospital so that she could undergo a myelogram that might lead to the performance of a cervical laminectomy, if indicated. The myelogram was performed on October 11th, and was positive and the nuerosurgeon decided to perform the cervical laminectomy on Thursday, October 13th, 1983. Surgery was performed on October 13th, 1983, and Phyllis came through the surgery very well and was able to come home on Saturday, October 15th, 1983. Counsel for the Petitioner spent as much time as he

could with Phyllis and tried to cover his law practice the best he could. In addition, he had to supervise his 17 and 15 year old daughters and take care of the household. Petitioner's counsel studied the Decision, Findings and Judgment over and over again during this period, attempting to really understand what Judge Claiborne intended to do, and could not determine just how Petitioner stood. She had won on the issue of liability as far as usury was concerned, but it appeared that insofar as damages, the Judge had split the baby in half, and dissolved the injunction that prevented foreclosure on Petitioner's home. The Petitioner was performing as a singer in Atlantic City, New Jersey at the time and did not receive copies of the papers for at least a week. Needless to say, she could not understand the Decision either. Counsel and Petitioner were not able

to confer until October 18th, due to the personal problems of counsel for the Petitioner as indicated, and the location of Petitioner in Atlantic City, New Jersey.

Counsel for the Petitioner conducts most of his practice in the Nevada State Courts. Nevada had adopted the Nevada Rules of Civil Procedure, which is closely parallel to federal rules; however, N.R.C.P. 59(e) reads as follows:

> "A motion to alter or amend the judgment shall be served not later than ten days after service of written notice of entry of judgment."

Petitioner's counsel knew that he would not receive a written notice of entry of judgment, as that is not the practice in Federal Court. However, Petitioner's counsel knew that when documents were served by mail, three additional days would be added to the prescribed period, and counsel for Petitioner

read F.R.C.P. 6(e) which is substantially identical to N.R.C.P. 6(e) and concluded erroneously that he had an extra three days to file the Rule 59(e) motion.

On November 1st, 1983, the Respondents Martin and International Funding opposed Petitioner's motion. Said opposition went to the merits and did not deal with the timeliness of the filing of the motions. Respondents Elerdings filed their opposition on the 4th of November, 1983. Said opposition again went to the merits, and did not raise the issue of timeliness. As a matter of fact, the Elerdings stated,

> "This court has equitable jurisdiction to decide the instant motion."

If Respondents had raised the issue of timeliness in their oppositions, Petitioner then had time to file a Notice of Appeal prior to the expiration of 30 days.

Petitioner asserts that the standard of review of Judge George's denial of the motion to grant relief, should not be an abuse of discretion standard because of the peculiar circumstances of this case insofar as Judge Claiborne was concerned. He was undergoing tremendous personal problems at this time and a number of different judges handled this matter. This was not a case where the judge that denied the motion had been intimately involved in the case. The Ninth Circuit in its Opinion applied the abuse of discretion test, and denied relief.

In addition to the foregoing facts, subdivision (a) of Rule 6 was amended in 1985, that would have made the October 20th, 1983 motion timely if the rule was in effect at that time. Advisory Committee's Notes to the 1985 Amendment states in part:

"The rule also is amended to extend

> the exclusion of intermediate Saturdays, Sundays and legal holidays to the computation of time. is less than 11 days. Under the current version of the rules, parties bringing motions under rules with 10 days periods could have as few as five working days to prepare the motions."

This is exactly the factual situation that occurred in the instant case.

The Ninth Circuit's decision had a different result than the case of Wansor v. George Hantsho, Inc. (5th Cir.) 570 F.2d 1202. In that case the district court directed a verdict on March 20th, 1975. On March 28th, a motion for new trial and judgment notwithstanding the verdict and to set aside the judgment was filed. On June 4th, 1975, the district court denied these motions. On June 13th, 1975 Wansor filed a motion to reconsider the June 4th order denying the previous motions. The motion to reconsider was denied on July 22nd, and a notice of appeal was filed on July 24th, 1975. The district court in

that case granted relief finding that the belief of counsel that the motion to reconsider on June 13th was excusable. The district court's opinion was affirmed on appeal. It would appear that if the district court in this case granted petitioner's relief the court of appeals would have affirmed that decision; however, we have in the instant case Judge George who was not the trial judge denying the motion and the 9th Circuit relying upon his discretion. Justice was clearly denied in this case.

The rule makers perceived that Rule 6(a) should be changed to relieve the hardship caused by mailing in a case like this. Should it not be an abuse of discretion to follow the rationale to the rule makers. The Rules of Civil Procedure are designed to secure justice. Thus far Petitioner has been held strictly to the letter of the Rule 59(e) and

6(a) as it existed in 1983. Yet Judge Claiborne and the Clerk have been given a liberal interpretation of Rules 54(b), 58 and 79(a).

Justice requires the Court to grant this Petition and reversal.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF MAILING

The undersigned hereby certifies that she served a copy of the Petition for Certiorari, together with a copy of the Appendix to Petition for Certiorari, on counsel for the Respondents, by placing copies thereof in the United States Mails, postage prepaid, addressed as follows:

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DATED this 27 day of October, 1987.

Marlys Osburn

Marlys Osburn